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4 Ways Conn. Justices Set Precedent On Asbestos Coverage

By **Jeff Sistrunk**

Law360 (October 7, 2019, 9:55 PM EDT) -- Insurers in Connecticut may find themselves shouldering greater costs to defend asbestos injury claims after a precedential state Supreme Court ruling on Friday, but they could see some relief thanks to a holding that makes it easier for carriers to invoke so-called occupational disease exclusions to deny coverage.

Here, Law360 looks at four questions the state justices answered in Vanderbilt Minerals LLC's massive coverage dispute with its insurers.

When Is Coverage Triggered?

The litigation dates back more than a decade and concerns Vanderbilt's efforts to secure coverage from 30 insurers for its costs to defend and settle scores of claims filed by people who were allegedly sickened by asbestos in the company's industrial talc.

One of the most critical questions in the dispute was how many of Vanderbilt's policies were triggered by the asbestos injury claims. On this point, the Connecticut Supreme Court adopted a portion of a midlevel state appeals panel's **voluminous March 2017 decision** in the case.

In a first for a Connecticut appeals court, the panel ruled that a "continuous trigger" theory dictates which insurance policies must cover asbestos-related injury claims. Under that theory, every policy that is in effect from the date an injured individual is first exposed to asbestos through the date that person develops an asbestos-related disease is triggered.

In addition to backing the appellate panel's decision on the coverage trigger, the Connecticut high court affirmed the panel's rejection of one insurer's bid to introduce the opinion of medical expert Robert Kratzke, who would have testified that an asbestos-related injury does not occur until the final cellular mutation that causes a disease to develop.

Sherilyn Pastor, chair of McCarter & English LLP's insurance recovery, litigation and counseling group, said the Connecticut Supreme Court's adoption of the continuous trigger for asbestos injury claims places it in line with the majority of other state high courts to have considered the issue.

"More importantly, the court declined to allow the insurers to inject an additional hurdle for policyholders in the form of testimony regarding the asbestos disease process," said Pastor, who represents policyholders. "If insurers had wanted to argue about the nature of that process before the continuous trigger was adopted for these types of claims in most states, they could have done so."

Who Fills the Coverage Gaps?

Under Connecticut's prevailing "pro rata" scheme for allocating coverage of asbestos and other "long-tail" claims spanning multiple years, a policyholder is generally held liable for a prorated share of defense and indemnity costs for any periods during which it is deliberately uninsured or underinsured. But on Friday, the Connecticut Supreme Court fully adopted the appellate panel's controversial first-of-its-kind holding that state law allows for a so-called "unavailability of insurance

exception" to pro rata allocation.

When the exception is applied, a policyholder is not liable for a share of legal costs for periods during which insurance for a certain risk is unavailable in the marketplace. Instead, the insurers whose policies were triggered must pick up the tab for that share.

The appellate panel said a pro rata allocation system based on a continuous trigger and including an unavailability rule "distributes the burdens equitably" among the policyholder and its insurers "and maximizes the resources available to respond to claims while minimizing administrative hassles and transaction costs."

That decision by the panel absolved Vanderbilt of any responsibility to cover a share of its defense costs in asbestos-related litigation between 1986 — when insurers largely stopped offering comprehensive coverage for asbestos risks — and 2008, when the company ceased talc production.

Pastor said the Connecticut high court's recognition of the unavailability exception fairly relieves policyholders of the obligation to help fund their own legal costs for years when they may have wanted to purchase coverage but couldn't.

"I think the court addressed the issue appropriately and consistent with policyholders' reasonable expectations," she said.

On the other hand, Michael F. Aylward, a Morrison Mahoney LLP partner and president of the American College of Coverage Counsel, said the unavailability exception is problematic in practice. He pointed out that the Connecticut appellate panel applied the exception to Vanderbilt's case despite the fact that the company was able to buy limited asbestos-related coverage for years after 1986.

"How do you define when insurance was 'unavailable'?" asked Aylward, who represents insurers. "Is insurance unavailable if it is more expensive, or the limits aren't as big, or the scope of coverage isn't as broad? There are a host of secondary and tertiary questions that these courts have never addressed, and that has created a morass of problems for trial judges and practitioners. It is disappointing to me that the court didn't understand those problems and provide some sort of guidance as to what this rule looks like in practice."

Is Indoor Asbestos Exposure 'Pollution'?

The Connecticut Supreme Court also adopted the appellate panel's decision, on a matter of first impression for the state, that pollution exclusions in many of Vanderbilt's policies don't bar coverage for the underlying asbestos injury claims.

The panel agreed with the mineral company that the exclusions apply only to "traditional" environmental pollution, such as "when the dumping of waste materials containing asbestos causes asbestos fibers to migrate onto neighboring properties or into the natural environment," and not to asbestos exposures occurring in indoor facilities.

"It is clear ... that at that time in our nation's history the principal connotation of the terms 'pollutant' and 'pollution' was with reference to contamination of the natural environment by industrial and other hazardous wastes," the panel held.

Jacob Mihm of Hoke LLC, who represents Vanderbilt, said this prong of the Connecticut high court's decision was also important for policyholders because "insurers have long tried to apply pollution exclusions to these product liability claims."

"It will be beneficial to have this opinion standing for the position that the ordinary third-party product liability lawsuits are not barred by these pollution exclusions," Mihm said.

How Broad Are 'Occupational Disease' Exclusions?

Ruling on an issue of national first impression, the Connecticut Supreme Court agreed with the appellate panel that a trial court improperly interpreted the "occupational disease" exclusions in some of Vanderbilt's policies to preclude coverage only for asbestos injury claims brought by the company's

own workers, and not claims by workers at other companies in Vanderbilt's supply chain.

The state justices found it noteworthy that the exclusions didn't contain any language "expressly limiting their application to the employees of the insured," while other exclusions contained in the same policies do feature such explicit language.

"This omission is significant because it indicates that, when the drafters of the policy desired to limit the application of an exclusion to a certain group of individuals, they did so," the high court held. "It renders all the more unambiguous the lack of any such express limitation in the occupational disease exclusions."

The Connecticut Supreme Court added that, in order to adopt Vanderbilt's proposed interpretation of the exclusions, they would have to "add otherwise nonexistent language," which would contravene how the state justices have long interpreted insurance policies and other contracts.

Lawrence D. Mason of Goldberg Segalla LLP, who represents Vanderbilt's excess insurer National Casualty Co., said the state high court's ruling on the exclusions was a victory for fundamental contract interpretation principles.

"The court thankfully has followed the long history of other courts who have followed rules of contract construction and given policy language intent without torturing that language outside of its plain wording," Mason said. "This ruling has significant implications, because this issue had never been presented before this case."

--Editing by Kelly Duncan and Alanna Weissman.
